

DAVID MEETS GOLIATH IN THE LEGISLATIVE ARENA: A LOSING BATTLE FOR AN EQUAL CHARITABLE VOICE?

It is discriminatory not to allow tax exempt organizations to advocate directly before Congress on an equal basis with private business. Moreover, these organizations can be a valuable source of information. They can broaden legislators' understanding of proposed legislation, and they can suggest valuable legislative alternatives.¹

I. INTRODUCTION

Power to the People! This ever recurring demand of the young and old alike is a symptom of our times. It points to a common desire of all who are actively pursuing change in our communities, institutions and government. It sounds the cry of an informed citizenry frustrated in their attempts to participate in a legislative system which seeks to exclude their voice.

President Nixon recently pleaded for the involvement of the public in the problems of our nation in his Message to the Congress on the Environment. His call was for "greater citizen involvement" since "[t]he tasks that need doing require money, resolve and ingenuity—and they are too big to be done by government alone."² Whether or not problem solving is best effectuated by

1. Letter from Senator Edmund Muskie, September 20, 1971, on file *San Diego Law Review*. Solicited comment in connection with proposed amendment to Section 501(c)(3) of the Internal Revenue Code, note 87 *infra*.

2. 116 CONG. REC. 3095 (1970). The need for more participation in administrative hearings and proceedings was sounded by Judge (now Chief Justice) Burger in a decision involving the Federal Communications Commission:

The theory that the Commissioner can always effectively represent the listener interests . . . without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commissioner can continue to rely on it. *United Church of Christ v. FCC*, 359 F.2d 994, 1003-4 (D.C. Cir. 1966). A more precise statement was given by former FTC Commissioner Phillip Elman:

individual or concerted action is subject to continual debate. The fact apparent is that individual action is the seldom chosen means of involvement, with group affiliation being preferred.³

The inability of citizen groups to partake in the legislative process coupled with the highly organized state of lobbying in the business sector is the cause for much of the public concern and frustration. A contributing factor to the lack of citizen involvement is found in the Internal Revenue Code:

1. Public Charities: Section 501(c)(3) permits tax exemption for a charitable corporation if "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation"⁴ As to the individual, Section 170 prohibits deductibility of contributions to such an "action" organization participating in the legislative process.⁵

2. Private Foundations:⁶ Section 4945(d)(1) prohibits *any* at-

Almost all observers of the regulatory process—in Congress, the Executive Branch, the bar and academic community, and indeed in the agencies themselves—are agreed on two central points: (1) the agencies have, in general, failed to develop and implement regulatory policies fully responsive to public needs and the public interest; and (2) a basic reason for such failure is the lack of adequate citizen involvement and participation in agency proceedings.

Hearings on Tax Exemptions for Charitable Organizations Affecting Poverty Programs Before a Subcomm. of Labor and Public Welfare, 91st Cong., 2d Sess. 209 (1970) [hereinafter cited as Charitable Poverty Hearings].

3. Such unification may stem from the perception of the individual as being powerless in a nation of giants. In accord with the contemporary realities of the function of the individual is the pluralist theory which points to the weakness in geographical representation. The theory advances that better decision-making for society, at least over the long run, will be produced where competing interest groups have a chance to advocate and compromise in the decision-making process. *See generally* H. KATZEL, *THE DECLINE OF AMERICAN PLURALISM* (1961), W. CONNOLLY, *IN BIAS OF PLURALISM* (1969).

4. INT. REV. CODE OF 1954, § 501(c)(3).

5. *See* INT. REV. CODE OF 1954, § 170(c)(2)(D) for the specific denial of the deduction. *See also* Treas. Reg. § 1.501(c)(3)—1(c)(3) (1959) defining "action" organization.

6. INT. REV. CODE, § 509(a) defines "private foundations" to include all tax exempt organizations under § 501(c)(3) except:

- (1) Churches, hospitals, schools and publicly supported organizations.
- (2) Organizations which deal with the public and as such receive more than one-third of their support from providing services or from gross investment income.

tempt to influence legislation,⁷ even where insubstantial in scope, and provides for an integrated system of sanctions⁸ for any such "taxable expenditures."⁹

3. Business Expenses: Section 162(e) allows deduction for all ordinary and necessary trade or business expenses incurred in direct connection with appearances before or communications with committees or individual members of Congress or any legislative body, provided such expenditures are in "respect to legislation or proposed legislation of direct interest to the taxpayer"¹⁰

The effect of the provisions posed may be characterized through Biblical imagery. The individual must unite with his fellows to form a small but courageous David going forth to do battle against a huge, powerfully armored Goliath in the arena of law making. The Internal Revenue Service is like a referee who rushes in to check the weapons. While Goliath hefts his sword, spear and battle axe unhindered, the referee threatens to disqualify David for putting rocks instead of mud in his sling.¹¹ An examination of the reasons for arming each sector in such a fashion, the challenges to such inequitable weaponry and possible corrective action are the considerations to be examined here.

II. DEVELOPMENT OF SECTION 501(C)(3): PROSCRIPTION OF SUBSTANTIAL LEGISLATIVE ACTIVITY.

The enactment of the Statute of Charitable Uses in 1601¹² provided for the protection and enforcement of then approved charities. It was realized that the word "charity" was an ever changing and enlarging consideration and recognition and enforcement of

(3) Organizations which are operated in a "subsidiary" nature to the above mentioned organizations.

(4) Organizations testing for public safety.

7. INT. REV. CODE, § 4945(d)(1) (emphasis added). See text accompanying note 55 *infra*, for exceptions.

8. See note 56 *infra*, regarding the method for levying the taxes and penalties.

9. Section 4945 defines a "taxable expenditure" to include four other categories of prohibited conduct: (1) influencing public elections and voter registration drives; (2) grants to individuals unless approved in advance and made on an objective and nondiscriminatory basis; (3) failure of a private foundation to exercise "expenditure responsibility" for grants to other private foundations and nonexempt organizations; (4) and other nonexempt expenditures.

10. INT. REV. CODE of 1954, § 162(e)(1)(A), (B).

11. Adopted from a similar analogy made by Dean M. Kelly, Director for the National Council of Churches of Christ in the U.S.A. *Charitable Poverty Hearings*, *supra* note 2, at 263.

12. The Statute of Elizabeth, 1601, 43 Eliz. 1, c. 4 (repealed).

new and novel charitable purposes and functions were accepted as long as they came within the spirit of the enactment.

The English view, adopted by Massachusetts, held that a charitable trust seeking to secure legislative reform was not engaged in a charitable purpose and hence could not stand.¹³ The duty of the court in such an instance was to expound the laws as they existed and not to assist in "the overthrowing or changing of them."¹⁴ It was reasoned that the court had no means of judging whether a proposed change in the laws would or would not be for the public benefit, and therefore the court could not say whether a gift to secure a legislative change was indeed charitable.¹⁵

But the trend was established distinguishing between a trust whose purpose was illegal and those which merely attempted to change the existing law by lawful means.¹⁶ Thus, exclusive of taxing considerations, charitable trusts which engaged in legislative activities were deemed charitable in the vast majority of American jurisdictions,¹⁷ with the majority being unconcerned with the wisdom of the plan or change.

13. *Jackson v. Phillips*, 96 Mass. (14 Allen) 539 (1867). A trust seeking the abolition of slavery and the reform of the fugitive slave law was held valid as a charity, while a trust to secure the passage of laws granting women the right to vote, hold office, and deal with their property on an equality with men, was invalid. As to the validity of the prior trust, an unconsidered point was its contrariness to the fugitive slave laws then existing in the Southern States. As to the invalidity of the latter trust, Massachusetts adhered to its position when the son of the *Jackson* testator came to court as settlor of a similar trust. *Bowditch v. Attorney General*, 241 Mass. 168, 134 N.E. 796 (1922).

14. *Id.* at 571.

15. *Id.*

16. "The trend of modern authority has been toward the upholding of trusts which have for their object the creation of a more enlightened public opinion, with a consequent change in laws having to do with human relations and rights in a republic such as ours. . . ." *Collier v. Lindley*, 203 Cal. 641, 650, 266 P. 526, 529 (1928). See also *Comment*, 16 CAL. L. REV. 478 (1928); *Note*, 37 VA. L. REV. 988 (1951); 36 MICH. L. REV. 139 (1937); But cf. *Reiling, Federal Taxation: What is a Charitable Organization?*, 44 A.B.A.J. 525-26 (1958).

17. "[A] trust for a public charity is not invalid merely because it contemplates the procuring of such changes in existing laws as the donor deems beneficial to the people in general, or to a class for whose benefit the trust was created." *Taylor v. Hoag*, 273 Pa. 194, 197, 116 A. 826, 827 (1922) (to promote improvement in the structure and the methods of government). See also *George v. Braddock*, 45 N.J. Eq. 757, 18 A. 881

The creation of the present income tax scheme in 1913 granted tax exempt benefits to charitable organizations.¹⁸ It would have been reasonable to assume that the Treasury, in determining what activities were charitable, would have followed the trend established in charitable trust law. Such was not the case. Treasury rulings¹⁹ and case law all evidenced the adoption by the Treasury and the courts of the Massachusetts view defining "charitable" as being exclusive of legislative activities.²⁰

The interpretive process determining the intent of the framers with respect to exclusive charitable purposes culminated with *Slee v. Commissioner*.²¹ Slee was denied deductibility of gifts to the American Birth Control League since the group sought to effect repeal and amendment of statutes dealing with birth control.²² But unlike the strict interpretation by the Treasury and the Board of Tax Appeals prohibiting all activities, Judge Learned

(Ct. Err. & App. 1889) (reform of land laws); *Garrison v. Little*, 75 Ill. App. 402 (1897) (attainment of woman suffrage prior to the passage of the 19th Amendment); *Buell v. Gardner*, 83 Misc. 513, 144 N.Y. Supp. 945 (Sup. Ct. 1914) (local prohibition); *Haines v. Allen*, 78 Ind. 100 (1881) (national prohibition); *Collier v. Lindley*, 203 Cal. 641, 266 P. 526 (1928) (wide reform for American Indians); *In Re Lewis' Estate*, 152 Pa. 477, 25 A. 878 (1893) (prevention of discrimination against the "colored race").

18. Section II(G)(a), Act of October 3, 1913, 38 Stat. 114 provides organization exemption to those organizations organized and operated for charitable purposes. The parallel deduction in computing net income was provided by Section 1201(2), Act of October 3, 1917, 40 Stat. 300. The Act of 1894 also made income tax inapplicable to organizations which were "conducted solely for charitable, religious, or educational purposes." Act of August 27, 1894, § 32, 28 Stat. 509. For development of early tax exemption see Reiling, *Federal Taxation: What is a Charitable Organization?*, 44 A.B.A.J. 525 (1958).

19. See, e.g., S. 1362, 2 CUM. BULL. 152 (1920) (denying tax exemption to an association which planned to promote uniformity of labor legislation); O.D. 704, 3 CUM. BULL. 240 (1920) (denying exemption to an association which sought to further the enactment of prohibition laws). Early Treasury position indicated that "... associations formed to disseminate controversial or partisan propaganda are not educational within the meaning of the statute." *Treas. Reg.* 45, art. 517 (1919), in T.D. 2831, 21 TREAS. DEC. INT. REV. 285 (1920).

20. See, e.g., *Herbert E. Fales*, 9 B.T.A. 828 (1927) (denying exemption to association advocating legislation to attain the suppression of intemperance, gambling, and political corruption; and the substitution of arbitration and conciliation for both industrial and international law); *J. Noah H. Slee*, 15 B.T.A. 710 (1929) (denying deduction to an association which sought to effect the lawful repeal and amendment of statutes dealing with conception).

21. 42 F.2d 184 (2d Cir. 1930).

22. "The only part of its activities which can be thought to touch upon legislation is in directing persons how best to prepare proposals for change in the law, and in distributing leaflets to legislators and others recommending such changes, chiefly by bringing before them such information as is supposed to 'enlighten' their minds." *Id.* at 185.

Hand gave recognition to the fact that the tax exempt function of charitable organizations may necessitate incidental activity in the legislative process.²³ The existence of such a relationship should not require loss of status if "[a]ll such activities are mediate to the primary purpose . . . [and] . . . [t]he agitation is ancillary to the end in chief, which remains the exclusive purpose of the association."²⁴ Notwithstanding the possibility for allowing incidental activities, the court declared:

Political agitation as such is outside that statute, however innocent the aim. . . . Controversies of that sort must be conducted *without public subvention*; the Treasury stands aside from them.²⁵

The validity of *Slee* has been criticized as being weak due to its lack of argumentative and authoritative justification.²⁶ Nonetheless, the principle enunciated stands and was in substance incorporated into the Code in the Act of 1934 which conditioned charitable exemption upon the proviso that activities which attempt to influence legislation cannot be of a substantial degree.²⁷ The Congressional findings evidenced little in the way of a clear and definitive reason for the proscription. Two Senatorial comments, however, indicate that the relevant considerations may have been a desire on the part of the federal government to refrain from subsidizing such activities²⁸ or to further curb, specifically, actions which were motivated by purely personal interests.²⁹

23. "[T]here are many charitable, literary and scientific ventures that as an incident of their success require changes in the law." *Id.*

24. *Id.* (dictum).

25. *Id.* (emphasis added).

26. Clark, *The Limitations on Political Activities: A Discordant Note in the Law of Charities*, 46 VA. L. REV. 439 (1960). Clark alludes to the decision's primacy in the field being due more to the eloquence and illustrious name of its author, than to the cogency of its argument.

27. INT. REV. CODE OF 1934, § 101(6), 48 Stat. 680 (now INT. REV. CODE OF 1954, § 501(c)(3)).

28. Concerning the proviso regarding substantial legislative activities and its desired applicability to other organizations:

[I] see no difference between one organization that might be on one side of the fence getting contributions to propagandize and influence legislation and being permitted to proceed without interference, while at the same time preventing one that might have a different viewpoint from receiving or making use of contributions for the same purpose.

78 CONG. REC. 5861 (1934) (statement by Senator Harrison). The implicit rejection of subvention here stems from *Slee v. Commissioner*, 42 F.2d 184 (2d Cir. 1930), see text accompanying note 25 *supra*.

29. "There is no reason in the world why a contribution . . . should be

In view of contemporary realities both policies appear to have lost their justifying force as a means to found the continued existence of the provision.³⁰

Subsequent cases and Treasury action have been directed toward a quantitative determination of the substantiality test³¹ with questions remaining as to whether substantial is to be determined on an absolute standard or with respect to total activities.³²

III. DEVELOPMENT OF SECTION 162(E): DEDUCTIBILITY OF EXPENSES INCURRED DURING LEGISLATIVE ACTIVITIES OF DIRECT INTEREST TO BUSINESSES.

The Revenue Act of 1913 provided for the deductibility of all "necessary expenses actually paid in carrying on any business"³³ which was ruled very early by the Treasury to be exclusive of expenditures incurred in attempts to influence legislation, without regard to the legality or illegality of the activity pursued.³⁴ Contrary to this approach, the Board of Tax Appeals approached each case on an individual basis disallowing the deduction in instances where the amounts expended were unnecessary,³⁵ or the methods

deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee were [sic] trying to reach. . . ." 78 CONG. REC. 5861 (1934) (statement by Senator Reed).

The necessity of the original prohibition and its continued existence in fear of such motivations is questionable in light of two factors. First, the "charitable" recognition itself was then and continues to be definable to the exclusion of such selfish interests. See 28 U.S. (3 Pet.) 481 (App. 1830). Secondly, it is highly unlikely that private interests are capable of withstanding the democratic scrutinizing employed during the decision making processes of tax exempt organizations. See FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT (1965).

30. See text accompanying notes 51 and 77 *infra*.

31. *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955). Using a quantitative test the court held that if less than five per cent of the total activities of an organization are devoted to influencing legislation, such amount was to be regarded as insubstantial. See also *Seasongood, Contributions to a Tax Exempt Local Good-Government League*, 35 TAXES 103 (1957); 18 MONT. L. REV. 112 (1956).

32. Borod, *Lobbying for the Public Interest—Federal Tax Policy and Administration*, 42 N.Y.U. L. REV. 1087, 107-08 (1967) [hereinafter cited as *Borod*].

33. Act of October 3, 1913, 38 Stat. 114, 166, 167, 172.

34. T.D. 2137, 17 TREAS. DEC. INT. REV. 48, 57, 58 (1915). "Sums of money expended for lobbying purposes . . . are held not to be an ordinary and necessary expense in the operation and maintenance of the business of a corporation. . . ." Treas. Reg. 33, art. 143, 20 TREAS. DEC. INT. REV. 197 (1920).

35. See, e.g., *The Adler Company*, 10 B.T.A. 849 (1928); *Old Mission Portland Cement Company*, 25 B.T.A. 305 (1933), *aff'd* 69 F.2d 676 (9th Cir. 1934).

employed were illegal,³⁶ or the business itself was subject to questions of legality.³⁷ But in instances where the expenditures were *in fact* ordinary and necessary, deductibility was found.³⁸ Further confusion arose with the Ninth Circuit and the Board taking opposing views³⁹ which led to what appeared to be finality of the issue in *Cammarano v. United States*.⁴⁰

The Supreme Court in *Cammarano* disallowed the deduction of business expenses incurred by a liquor dealer in fighting legislation inimical to his business interests without regard to the lower court finding that the expenditures were not illegal, immoral nor in contravention of any defined public policy.⁴¹ Mr. Justice Harlan, in an exacting manner, perceived:

[T]he deductions sought are prohibited by Regulation which themselves constitute an expression of a *sharply defined national policy*, further demonstration of which may be found in other sections [170(c)(2)(D) and 501(c)(3) of the 1954] Internal Revenue Code.⁴²

Mr. Justice Harlan's "sharply defined national policy" was supported upon two questionable bases. First, he found that Congressional ratification of the administrative interpretation (*i.e.* the Treasury Regulation disallowing legislative activities) was accomplished by the failure of Congress to amend the pertinent section, such inaction being tantamount to policy adoption.⁴³ Secondly,

36. See, *e.g.*, G.T. Wofford, 15 B.T.A. 1225 (1929); Los Angeles & Salt Lake R.R. Co., 18 B.T.A. 168 (1929).

37. See, *e.g.*, William P. Kyne, 35 B.T.A. 202 (1936).

38. See, *e.g.*, George Ringer & Company, 10 B.T.A. 1134 (1928).

39. *Sunset Scavenger*, 31 B.T.A. 758 (1934), *rev'd* 84 F.2d 453 (9th Cir. 1936).

40. 358 U.S. 498 (1959).

41. It is admitted in the record that the sums here in question were spent by the taxpayer for the purpose of defeating the enactment of certain legislation . . . and being so, those sums are not deductible from gross income. This is not to indicate that there is anything evil or corrupt about spending money for these purposes. . . . They had a right to do that and propriety of expenditures therefor is not in question.

Cammarano v. United States, No. 1873 (W.D. Wash. March 19, 1956), 56-2 U.S. Tax. Cas. ¶ 9878.

42. 358 U.S. at 508.

43. Failure to amend "requires the conclusion that the administrative interpretation was ratified by Congress . . ." and the regulations "have acquired the force of law." *Id.* at 510. The use of such a device for determining Congressional policy is highly suspect as being a form of judicial legislation. See, *e.g.*, Sharp, *Reflection on the Disallowance of In-*

Congress by its action in 1934 (i.e. amending section 501(c)(3) to deny tax exemption to charitable organizations which pursued substantial legislative activities) apparently adopted the view of Judge Learned Hand disfavoring public subvention of such legislative activities.⁴⁴ Thus, the Court reasoned in regard to expenditures to influence legislation, "... everyone in the community should stand on the same footing as regards its purchase so far as the Treasury of the United States is concerned."⁴⁵ In accord with the imposition upon charities with respect to legislative activities, the government argued that the policy against public subvention required denial of the deduction in order to further the "tax equilibrium" as it then existed.⁴⁶ The reliance by the Court on the "equilibrium" argument⁴⁷ provided the "equal footing to all" rationale and has been considered to be the principle justification for the decision.⁴⁸

Congress chose to repudiate the "tax equilibrium" theory and explicitly allowed some subvention of legislative activities for businesses by revision of section 162(e) in the Revenue Act of 1962.⁴⁹ Opposition to the amendment indicates public subvention was considered and in reliance upon *Cammarano* it was stated that credits "should not be given either to those who had a direct business interest or to those who oppose the direct business interest and fight for the general interest."⁵⁰ Contrary to the voiced opposition,

come *Tax Deductions for Lobbying Expenses*, 39 B.U.L. REV. 365 n. 80 (1959) and commentators cited therein.

44. See text accompanying note 25 *supra*, but cf. text accompanying note 51 *infra*.

45. 358 U.S. at 513.

46. At the present time, under the prevailing interpretation of [§ 162], any campaigns financed by industry to influence legislation cannot be charged to the Government by taking these expenses as a deduction. The financing is thus entirely out of the pocket of the concerns involved. This is equally true as to any citizens' organization which might be formed to conduct similar campaigns, since contributions to these campaigns would not qualify as charitable contributions and accordingly are not deductible. The same is true of labor organizations. Thus tax equilibrium exists. If the expenses of the business community were to become deductible, this tax equilibrium would be upset. While the business community could deduct their expenses, all others could not, *even with respect to the same legislation*.

Brief for Respondent, at 12, 35-36 (emphasis in original).

47. 358 U.S. at 513.

48. See Boehm, *Taxes and Politics*, 22 TAX L. REV. 369 (1967); but cf. Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives*, 68 COL. L. REV. 801, 11-12 (1968), indicating that the equilibrium concept is inapplicable in a comparison of the two sectors, business and charity.

49. 76 Stat. 973 (1962).

50. 108 CONG. REC. 17,767 (1962) (statement by Senator Douglas). The general interest refers to the effects of section 501(c)(3) and points to the substance of the inequities presently existing.

Congress rejected the equality considerations for the more desirable policy "that taxpayers who have information bearing on the impact of present laws, or proposed legislation . . . are not [to be] discouraged in making this information available to Members of Congress or legislators at other levels of Government."⁵¹

IV. PRIVATE FOUNDATIONS: PROHIBITION OF ALL LEGISLATIVE ACTIVITIES

The Tax Reform Act of 1969,⁵² in its attempt to correct the abuses occurring under section 501(c)(3),⁵³ recognized and provided restrictions upon the large, grant-making institutions characterized as private foundations.⁵⁴ The new law prohibits the insubstantial degree of freedom in legislative activities granted under the previous provisions to such foundations and invokes a total prohibition of such activities. The prohibition is subject to three exceptions which permit the private foundation (1) to make available the results of nonpartisan analysis, study or research; (2) to furnish technical advice or assistance in response to requests by governmental bodies; (3) to attempt to influence legislation concerning the existence of the private foundation, its powers and duties, its tax exempt status, or the deduction of contributions to it.⁵⁵ In the event expenditures are made by the foundation for prohibited activity, they are deemed to be "taxable expenditures" and are subject to a system of taxes determined by the amount of funds so expended.⁵⁶

The purpose of the restructuring appears to be an attempt to attack past abuses with respect to political activities; such activities not being of a nature calculated to benefit all, as is the inherent requisite of the charitable calling. More particularly, occasional

51. S. REP. NO. 1881, 87th Cong., 2d Sess. (1962).

52. PUB. L. NO. 91-172 *amending* INT. REV. CODE OF 1954.

53. See text accompanying notes 62-64 *infra*.

54. See note 6, *supra*, defining "private foundations".

55. INT. REV. CODE, § 4945(e)(2).

56. Section 4945(a) imposes an "initial tax" of ten percent of the expenditure so incurred on the foundation and two and one-half percent of the expenditure on a "knowing" manager. If corrective action is not taken "additional taxes" are imposed under section 4945(b) to the extent of 100 percent of the expenditure upon the foundation and 50 percent upon the manager if he refuses to agree to the correction. Wilful or repeated flagrant acts invoke a penalty under section 6684 equal to the amount of tax incurred under section 4945.

abuses had been noted with respect to particular political candidates or particular political parties.⁵⁷ Also advanced were the advantages attributed to larger foundations under section 501(c)(3) permitting a greater amount of "prohibited activities" due to the substantiality test which was gauged in relation to total activities.⁵⁸ And, in the event of loss of status, the larger foundations were better equipped to take advantage of the alternative forms of tax exemption.⁵⁹

V. CHALLENGES

The propriety of the present taxing imbalance in respect to legislative activities between business and charitable organizations is susceptible to critical challenge under constitutional analysis and contemporary social demands.

A. Constitutional

A preliminary question always to be considered in analyzing the constitutional impropriety of the benefits and burdens imposed under income taxing provisions is their constant characterization as being matters determined solely within the legislative grace of Congress.⁶⁰

A relevant consideration is the potential for Congressional grace being subverted to the grace of the Internal Revenue Service in its *ad hoc* determinations. A general appraisal of the charitable provision under consideration indicates that it is unusual in the sense that it does not delineate the operative procedures for determining income. Rather than being transactional in nature, section 501(c)(3) is determinative of an overall status which may become muddled, with eventual denial of status, when a "substantial" amount of the proscribed activity is calculated to exist.⁶¹

57. HOUSE COMM. ON WAYS & MEANS, TAX REFORM ACT OF 1969, H.R. REP. NO. 91-413, 91st Cong., 1st Sess., pt. 1 at 32 (1969); SENATE COMM. ON FINANCE, TAX REFORM ACT OF 1969, S. REP. NO. 91-552, 91st Cong., 1st Sess., at 47 (1969).

58. *Hearings on Tax Reform Before the House Comm. on Ways & Means*, 91st Cong., 1st Sess., pt. 2 at 808-10 (1969).

59. HOUSE COMM. ON WAYS & MEANS, TAX REFORM ACT OF 1969, H.R. REP. NO. 91-413, 91st Cong., 1st Sess., pt. 1 at 32 (1969).

60. *New Colonial Ice Co. v. Helvering*, 292 U.S. 435 (1934). Commentators have challenged the resultant discriminatory effect in the development of the law concerning "privileges" and "rights". See generally Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Reich, *The New Property*, 73 YALE L.J. 733 (1964); O'Neil, *Unconstitutional Condition: Welfare Benefits With Strings Attached*, 54 CALIF. L. REV. 443 (1966).

61. Statutes touching on speech must be narrowly drawn so that ad-

A second weakening factor of the legislative grace argument has been its demise in the eyes of the Supreme Court when such grace touches upon protected speech. In *Speiser v. Randall*,⁶² a California statute which conditioned the grant of a veteran's property tax exemption on the taking of a loyalty oath was declared unconstitutional. The California Supreme Court in determining the extent of the restriction on speech recognized only that conditions imposed upon the granting of privileges or gratuities be "reasonable". The Supreme Court was more exacting:

To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a "privilege" or "bounty" its denial may not infringe speech.⁶³

Subsequent decisions have continued the erosion of the conditioning of a governmental benefit or gratuity upon the surrender of a constitutional right as a condition of that favor.⁶⁴

The right to petition, which embraces the free and equal opportunity of each constituent to communicate his ideas and opinions to his representatives, give rise to conflicting interests in its application to charitable organizations. Although the right to petition is not specifically mentioned in the Constitution, it is one of the basic freedoms protected by the Bill of Rights.⁶⁵

ministrative officials may not use them to arbitrarily discriminate between speakers. It has been urged that the statute here is not worded with sufficient clarity and specificity to insure that the administrators cannot use it to discriminate. See Note, *The Revenue Code and a Charity's Politics*, 73 Yale L.J. 661, 663 & n. 12 (1964) indicating the question of IRS favoritism towards certain religious beliefs (i.e. theistic) over others (i.e. non-theistic). *Borod*, *supra* note 32, at 1106-10 (1967). Also the vagueness of the "substantiality" test creates an uncertainty which tends to result in a chilling effect and unduly intimidates potential speakers. See *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Smith v. California*, 361 U.S. 147 (1959).

62. 357 U.S. 513 (1958) [hereinafter cited as *Speiser*].

63. *Id.* at 518.

64. *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Spevack v. Klein*, 385 U.S. 511 (1967) (a license to practice law).

65. "The [right to petition] would seem unnecessary to be expressly provided for in a republican government since it results from the very nature of its structure and institutions." 2 STORY ON THE CONSTITUTION § 1894 (4th ed. 1873); *Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

The extent to which the right to petition may be availed by corporations⁶⁶ in light of our system of equal representation and our notions of "one man one vote" is debatable. One contention is that large corporations, economic associations, charitable organizations and other group affiliations should not be considered "people" within the meaning of the right to petition under the first amendment since they are not the "people" who "elect" under the meaning of the Constitution.⁶⁷ The result of including such organizations within the right to petition would be to undermine equal individual representation with the furtherance of functional representation. Such functional representation in the state legislatures has been held to constitute a violation of equal protection.⁶⁸ Nonetheless, the extent to which equal representation is *in fact* accomplished today is doubtful considering the highly organized state of lobbying in all sectors, including the government itself.⁶⁹ The encouragement of businesses to influence legislation under 162(e) is an indirect form of functional representation since it results in the advancement of the ideas, opinions and desires of the business entities rather than those ideas, opinions and desires of individual persons.

The subtle encouragement of functional representation through deduction of expenses for appearances to influence legislation relevant to a business entity supports a similar allowance for charities. Such charitable organizations often desire legislation which business groups oppose, they can argue that unless they are allowed to fight deductible "lobbying" with "lobbying" paid for by deductible contributions, the business groups who are allowed the deduction will be given an unfair advantage in the exercise of their first amendment freedoms. The Supreme Court in *Cammarano* recognized this potential in its application of *Speiser* to the facts. The Court noted that the conditions infringing upon first amendment freedoms were uniform⁷⁰ and any granting of deduc-

66. On the right to petition and its application to corporations, see generally Walden, *More About Noerr—Lobbying Antitrust, and the Right to Petition*, 14 U.C.L.A.L. REV. 1211, 1242-46 (1967).

67. U.S. CONST. art. 1, § 2. See Walden, *supra* note 72, at 1245.

68. "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

69. Concerning the propriety of various activities by executive agencies, Representative Curtis (R. Mo.) has commented: "[Executive agencies] . . . have a forum . . . in the Congressional Committees, and they should use it. They also have the ability to communicate directly with the people, as the President does on TV time. . . . So lets have a cessation of . . . Executive officials [and] cabinet officers coming into Congressmen's offices." *Legislators and the Lobbyists*, CONG. Q. SERV., p. 17 (1965).

70. "Petitioners are not being denied a tax deduction because they en-

tions to business would upset the "tax equilibrium".⁷¹ The amendment of section 162 subsequent to *Cammarano* has indeed created the imbalance which the Court so deftly sought to avoid.

The previous examination of the historical aspects of the three provisions may aid in the search for a justification limiting legislative activities of charitable organizations. As previously mentioned, the justification developed by the Treasury and Judge Learned Hand in *Slee*, the policy against governmental subvention of legislative activities,⁷² was considered and rejected by Congress in the adoption of section 162(e).⁷³ Two potential areas of abuse, however, appear to be the underlying justifications for the restriction of legislative activities. First, as previously mentioned, the charitable exclusion is founded upon a determination that the charitable activities must be activities for the betterment of all and should exclude those activities which are motivated by purely selfish interests.⁷⁴ Secondly, the motivations which led to reform in the area of private foundations appear to be the apprehensions which have always underlied the restriction. That is, the abuses occurring in the political arena were demanding of correction.⁷⁵

Assuming that the governmental purposes of the restriction are indeed legitimate and substantial, the prohibition of substantial legislative activities for charities may be an overly broad means of attaining the permissible end.⁷⁶ The question being whether prohibiting personal gain and direct "political" activities lend themselves to a narrower means of attainment than by indiscriminate proscription of the legislative activities of charities. The business deduction permits attempts to influence legislation if such attempts are of a direct interest to the taxpayer. Permitting charitable organizations to influence legislation of direct interest to their purpose would maintain the desired result of prohibiting selfish

gage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under provisions of the Internal Revenue Code." 358 U.S. 498, 513 (1959).

71. *Id.*

72. See text accompanying note 25 *supra*.

73. See text accompanying note 51 *supra*.

74. See note 29 *supra*.

75. See note 57 *supra*.

76. NAACP v. Alabama, 377 U.S. 288, 307-08 (1964).

gain. The purpose having been deemed charitable would continue, merely to be augmented by legislative activity.⁷⁷

Although 501(c)(3) also prohibits intervention in any political *campaign* on the behalf of any candidate,⁷⁸ the requirements imposed upon private foundations are more direct and specific in that they restrict communications with *individual* public officers.⁷⁹ Albeit campaign involvement is a legitimate concern, it is the nefarious activities which transpire with individual public officers which are objectionable and not legitimate business conducted with legislative bodies. The exactness of the foundational restrictions and their ability to reach the contemplated conduct are easily adaptable to charitable organizations and allow the end (restriction of political activities as opposed to blanket legislative activities) to be more narrowly achieved without unnecessarily sweeping into the right to petition one's legislator.

B. Social

Changing social conditions have necessitated an increase of governmental involvement in the charitable sector, casting doubt upon the ability of the charitable sector and the public in general to effectively "fend for itself" without governmental intervention. With the expanding role which government has played in the field of charitable work, a greater need has developed for a charitable "voice."

In addition to continued devotion to ameliorating the condition of the poor and sick, the call of the present day charitable organization is to seek out the causes of economic and social injustices. The charitable calling has enlarged from the hospitals, old peoples' homes, and orphanages to the environmental groups, civil rights groups, poverty groups, consumer advocate groups and public interest law firms. The facts of contemporary charitable activity and its attempts "to lessen the burdens of government"⁸⁰ are thwarted by the very legal framework within which it operates by being effectively denied a voice in the arena where enduring solutions are created.

77. This is not to say that the charitable purpose pursued would be without private gain to the members, but such gain would be a mere incident of the benefit for all.

78. INT. REV. CODE, § 501(c)(3).

79. INT. REV. CODE, § 4945(e)(2) (emphasis added).

80. The definition of allowable charitable purposes adopted by the Treasury includes the concept of lessening the burdens of government. Treas. Reg. § 1.501(c)(3)—1(d)(2) (1959). The language appears to have its origin in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556 (1867). See text accompanying notes 14-23 *supra*.

Increased social and economic activity by the government has been accompanied by a reversal in its attitude toward public subvention of legislative activity. Instances of subsidization and direct employment by the government for such services in the legislative and judicial forums are numerous.⁸¹

Democratic political theory assumes that rational decisions can be best reached after hearing and evaluating the interests of component members. These interests are in theory expressed by individuals through the medium of their elected representatives in legislature. Election of these representatives on a geographical basis overlooks the fact that individuals identify their interests to a greater extent with business, economic, social, or fraternal groups than with state or political subdivisions. The failure of the Constitution to provide for group representation and the subtle encouragement of those with direct and appreciable business interests to actively legislate, results in a great disparity in representation for the individual citizen. The general interest of the citizen and taxpayer, and the general and diffused interest of the consumer receive no deduction when lobbying is engaged upon in their behalf.⁸²

The need has been expressed by legislators for active participation by groups which concern themselves with the problem areas presently pursued by charitable organizations.⁸³ Legislators, in-

81. The Congressional Research Service, see text accompanying notes 83, 84 *infra*, and the Neighborhood Legal Services funded by the Office of Economic Opportunity exemplify funding by the government of activities which attempt to read and react to public demands in a manner which may be deemed "political" or "controversial" in nature.

82. An example of the potential of this disparity was shown by Senator Douglas when the adoption of section 162(e) was being considered.

Let us consider the gas bill which Senator Kerr sponsored. To the gas and oil industry that bill meant \$600 million a year. But to the 30 million householders who use gas to cook and heat it meant on the average of only \$20 a year. Very few people will become sufficiently interested in the subject, study it, and then be able to afford to come to Washington to lobby against it when only \$20 for each is involved. As a result, the powerful interests of the producing groups are strong and vigorous. The diffused general interest groups are weak.

108 CONG. REC. 17,767 (1962).

83. "[W]e are passing laws and spending money to deal with all these problems [of poverty], but our information is poor. We don't understand the problem. I don't see how we are ever going to straighten this out until we understand the problem." *Hearings Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 89th

capable of personally investigating every governmental problem, have become dependent upon the influential activities of the Congressional Research Services.⁸⁴ The detached and bare objectivity with which the Research Service functions makes desirable the activities of charitable organizations which, with their first hand knowledge of the problems, pursue potential solutions with enthusiasm and vigor and are capable of providing findings in greater depth. It may be that in certain instances the activities of charitable organizations may result in a duplication of effort with those of the Research Service. In such instances, indirect subsidy through deductible charitable contributions may indeed prove less costly to the taxpayer than direct appropriation.

VI. CONCLUSION

Due to the deep seated observance of legislative grace and the abhorrence of judicial nullification of income taxing provisions in the past, constitutional invalidity of the prohibition of legislative activity seems unlikely. Administrative reform has been advocated by certain commentators; it being proposed that the underlying statutory purpose of the restriction, prevention of personal gain, be distinguished to a greater extent by the development of guidelines which de-emphasize legislative activities *per se* and the "abstract ruminations over what is 'substantial' ".⁸⁵

The reform most needed is statutory. Recognizing that charitable organizations "can be a valuable source of information; they can broaden legislators' understanding of proposed legislation; and they can suggest valuable legislative alternatives",⁸⁶ a recent proposal has been geared to permit legislative activities of a direct interest to a charitable organization.⁸⁷ The essence of the proposed amendment allows statements or communications to the legislative bodies by charitable and educational organizations on matters directly affecting any purpose for which such organizations are organized and operated. The amendment would not change

Cong., 2nd Sess., pt. 5, at 1115 (1966) (statement by Senator Ribicoff). See also Note, *The Poor and the Political Process: Equal Access to Lobbying*, 6 HARV. J. LEG. 369 (1969).

84. 2 U.S.C. § 166 (1970).

85. Borod, note 32 *supra* at 1117. An appealing measure which would grant equal treatment to all regardless of taxing status is the voucher system. See Note, *The Poor and the Political Process: Equal Access to Lobbying*, 6 HARV. J. LEG. 369 (1969).

86. 117 CONG. REC. S 4069 (daily ed. March 30, 1971) (statement by Senator Muskie).

87. CONG. REC.: S 1408, 92d Cong., 1st Sess., 117 CONG. REC. S 4070 (daily ed. March 30, 1971).

the present restrictions on mass attempts to influence the general public (grassroots lobbying),⁸⁸ nor would it permit political campaign involvement nor change the proscription of legislative activities for private foundations. The desire of the framers of the bill is to assure that Congress will have the most complete record possible when it considers legislation.

It must be noted that even with legislative equality provided to the extent possible, inequities will always exist. It is the poor or the non-taxpayers who shall always be unafforded the benefits conferred on others through tax deductions and tax credits. But perhaps this problem was indirectly recognized at the inception in 1913.

"Mr. Williams: Mr. President, the object of this bill is to tax a man's net income; that is to say, what he has at the end of the year after deducting from his receipts his expenditures or losses. It is not to reform men's moral characters, that is not the object of the bill at all."⁸⁹

But the benefits to be provided by legislative activity which are inherently denied the poor or non-taxpayers under the taxing injustices stand greater probabilities of being prosecuted through charitable organizations than by remaining without a voice at all.⁹⁰

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88. See Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives*, 68 COL. L. REV. 801 (1968).

89. 50 CONG. REC. 3849 (1913).

90. Subsequent to the writing of this article, hearings were held on an alternative bill, H.R. 13720, 92d Cong., 2d Sess. (1972), on May 2, 1972. The bill is supported by five members of the Ways and Means Committee and would allow five percent of total expenditures for attempts to influence legislation which is *not* related to the tax exempt purpose. As to activities directly related to the tax exempt purpose, H.R. 13720 would allow twenty percent of total expenditures to influence such legislation.